

The Credit Contracts and Consumer Finance Act 2003

Guidance for lenders operating during the COVID-19 pandemic



Updated 10 September 2021

The Commerce Commission (**Commission**) appreciates the very serious impact that COVID-19 is having on lenders and borrowers from time to time. Some borrowers will need to vary existing credit arrangements and others will find themselves needing access to new or restructured credit to ease the burden of an unexpected financial position.

Lenders may want to provide additional support and flexibility to financially stressed borrowers at this time and the scale of borrowers' needs may fluctuate from time to time depending on the nature and scale of the impact of COVID-19 on the economy.

Appropriate access to credit should be facilitated and maintained while borrowers' interests are also properly protected.

This guidance was first introduced in April 2020 (and amended 1 May 2020) at the time New Zealand's first Alert Level 4 restrictions were in place, and is updated as at 10 September 2021 to acknowledge the ongoing changing circumstances that lenders and borrowers face.

New law changes and a revised Responsible Lending Code coming into effect on 1 December 2021 (except Chapter 12 of the Code which comes into effect on 1 February 2022) will alter responsible lending obligations and associated guidance. Accordingly, unless updated to reflect those changes this guidance will cease to apply from 1 December 2021.

Purpose of guidance

- 1 The purpose of this guidance is to assist lenders to apply the provisions of the Credit Contracts and Consumer Finance Act 2003 (**CCCF Act**) during the time that the New Zealand economy is affected by COVID-19. The CCCF Act, and therefore this guidance, applies to consumer lending. It does not apply to loans provided to businesses.
- 2 At this time, the Commission anticipates that the circumstances arising as a consequence of COVID-19 are most likely to raise questions relating to:
 - 2.1 the application of the Lender Responsibility Principles. For example, the requirement that a lender makes reasonable inquiries to be satisfied that it is likely that a loan meets the borrower's requirements and objectives and that the borrower can make repayments without suffering substantial hardship;
 - 2.2 management of applications for changes to loans due to financial stress; and
 - 2.3 a lender's ability to provide initial, variation or continuing disclosure in the event of communications disruptions or unusually limited means of communicating with borrowers.

- 3 The Commission acknowledges that the application of the requirements of the CCCF Act will be informed by the circumstances in which lenders, acting reasonably, are operating while COVID-19 affects the New Zealand economy. Our approach to enforcement of the CCCF Act during this period also will be strongly informed by these circumstances. These circumstances may change from time to time depending on the nature and scale of the impact of COVID-19 on the economy.

Guidance may be changed or withdrawn

- 4 We may amend and add to this guidance as we continue to consider the application of the CCCF Act to circumstances that are influenced by COVID-19 and its economic effects. We may also withdraw this guidance when we consider it is no longer required. As set out above, this guidance will cease to apply from 1 December 2021 unless it is updated at that time to reflect the upcoming changes to responsible lending obligations.
- 5 In our role under the CCCF Act we are committed to actively engaging with lenders and borrowers and their representatives to better understand the issues facing the sector at any time. Where we can, we want to help to facilitate appropriate access to credit, while properly safeguarding consumers who borrow money. If you consider that any aspect of the CCCF Act and its requirements is impacting your ability to provide or access appropriate credit, please let us know so that we can consider whether further guidance can be provided.

Lender Responsibility Principles

- 6 When providing credit lenders must comply with the Lender Responsibility Principles set out in the CCCF Act.
- 7 Lenders must exercise the care, diligence and skill of a responsible lender (CCCF Act s9C(2)(a)). They must also comply with a range of other specified Lender Responsibility Principles (CCCF Act s9C(2)(b)).
- 8 Importantly, lenders must make reasonable enquiries before entering into a loan to be satisfied that:
 - 8.1 it is likely that the credit provided will meet the borrower's requirements and objectives (CCCF Act s9C(3)(a)(i)); and
 - 8.2 it is likely that the borrower will be able to make payments under the loan without suffering substantial hardship (CCCF Act s9C(3)(a)(ii)).
- 9 The Responsible Lending Code (version June 2017) (**Code**) elaborates on the Lender Responsibility Principles and provides guidance as to how lenders can comply with the Principles.
- 10 Both the Lender Responsibility Principles and the Code are expressed in broad terms. They provide flexibility for lenders to make appropriate lending decisions in the changing circumstances currently facing New Zealand.
- 11 However, the Commission acknowledges that lenders may not in all circumstances be able to strictly comply with all guidance contained in the Code. What is required to discharge the lender responsibilities will be informed by the circumstances in which lenders, acting reasonably, are operating while COVID-19 affects the economy. This includes consideration of what is practicable in the circumstances.

Affordability and suitability inquiries

- 12 The Code makes clear that, depending on the circumstances, it may be reasonable for a lender to make inquiries into matters other than those suggested in the Code when assessing the suitability of credit to meet the borrower's requirements and objectives. Equally, the scope and method of inquiries that are reasonable for a lender to make may differ depending on the circumstances.
- 13 Lenders should, as usual, make inquiries about whether the credit will meet the borrower's requirements and objectives. It will be important to obtain information about:
 - 13.1 the purpose of the loan;
 - 13.2 the time for which it is expected to be required;
 - 13.3 what form of credit is required; and
 - 13.4 how the borrower intends to make repayment.
- 14 We appreciate that, while businesses and services are disrupted, borrowers may have difficulties obtaining the supporting information and documents that would ordinarily corroborate an application and underpin a lending decision. Borrowers may be unable to provide copies of documents to lenders in person or by electronic means.
- 15 Lenders should make all reasonable attempts in the circumstances to obtain the information that they need to make responsible lending decisions. If, for example, information from third parties is not available and lenders seek to rely on information from borrowers, lenders should make as detailed enquiries as practicable to obtain the relevant information, to test its credibility and to create and keep records of the enquiries they make. They may permit borrowers to provide information verbally and follow up to verify information with copies of documents as soon as this is practicable. Lenders will be acting responsibly where they make reasonable decisions based on the best available information in the circumstances.
- 16 In the current circumstances when borrowers seek credit or the variation of existing credit, it may be appropriate to give greater consideration to the borrower's history and reasonable expectations of their future circumstances than under normal circumstances. As always, much will depend on the nature of the credit and the borrower's particular circumstances. For example, the factors that it may be reasonable for lenders to consider might include:
 - 16.1 the strength of the borrower's credit, income and repayment history;
 - 16.2 changes in the borrower's income arising as a direct consequence of COVID-19;
 - 16.3 the likely duration of the borrower's financial stress including their employment status and reasonable expectations of future likely income; and
 - 16.4 any steps the borrower is taking to address their financial stress.
- 17 In addition, the Code already contemplates that when inquiring into a borrower's income, a lender may make inquiries into the sources and stability of the borrower's income, including likely changes.
- 18 A lender should also inquire into the likelihood of repayment and this may include consideration of information that the lender considers reliable to form a view on the likelihood of repayment.

- 19 Again, depending on the circumstances, it may be reasonable for a lender to make inquiries into matters other than those suggested in the Code when assessing the likelihood of repayment without substantial hardship.
- 20 Depending on the terms of the credit arrangement, it may also be relevant for the lender to consider whether the borrower is able to make loan repayments without substantial hardship over the life of the credit arrangement if different terms and conditions apply to different periods during the term of the loan. For example, if a repayment holiday is provided, the lender should consider whether the borrower is likely to be able to make repayments when the holiday is over.
- 21 While lenders may take into account a range of information to assess the suitability and affordability of the loan or loan variation on offer, care should be taken to ensure that the relief offered does not go further than is required to meet the borrower's need or unnecessarily increase the borrower's indebtedness or financial commitments.

Duty to assist

- 22 The Lender Responsibility Principles also require lenders to assist borrowers to make informed decisions when entering into loans, and in all subsequent dealings (s9C(3)(b) and (c)).
- 23 For the purposes of the duty to assist, lenders should endeavour to comply with the guidance contained in the Code.
- 24 Communications with borrowers may need to be verbal if that is the only practicable means in the circumstances, but they should be followed up with disclosure in writing as soon as is reasonably practicable.

When new loans are entered into

- 25 Lenders should, for new loans, follow to the greatest extent possible the guidance in paragraphs 7.2–7.3 of the Code. It should not be assumed that the borrower has experience with the product or understands how it works or the repayment implications.

When varying loans

- 26 Borrowers experiencing financial difficulties as a consequence of the effects of COVID-19 may seek to vary the terms of existing loans to reduce those difficulties. Lenders should provide borrowers with information that enables them to compare the options available to them and the costs of those options. For example, repayment of interest only, or a reduction in the amount of the borrower's repayments for a period of time may be less costly in the long term than deferring loan repayments for a period of time.
- 27 Again, lenders should follow to the greatest extent possible the guidance in section 11 of the Code. However, in circumstances where it is impracticable to comply with the whole of that guidance lenders should at the very least communicate to borrowers the following key messages (to the extent applicable to the variation):
 - If payments are to be deferred:
 - That no payments will be made during the period of the deferral;
 - The period of time for which payments will be deferred;
 - Whether the borrower will be charged interest on the loan during the period of the deferral (and therefore whether the loan amount will increase during the period of the deferral and while no payments are being made); and
 - What the borrower's payments and loan term are expected to be after the deferral period.

- If the borrower’s payments will be reduced for a period of time:
 - The amount of the reduced payments;
 - The period over which they will be reduced; and
 - What the borrower’s payments and loan term are expected to be after the period that reduced payments are made.
- If the loan term will be extended:
 - How long the loan has been extended for; and
 - When the loan is to be completely paid off.
- Whether the loan deferral and/or reduced payments and/or extended term mean that the borrower may have to pay more over the term of the loan, including more interest.

28 Where a lender varies or refinances an existing loan to provide additional credit to a borrower, it should make inquiries relating to affordability and suitability as necessary to comply with the lender responsibility principle in s9C(2)(a)(iii) and/or the lender responsibilities contained in s9C(3)(a)(i) and (ii).

Additional steps for vulnerable borrowers

29 Lenders must also, as usual, take additional steps if the lender reasonably suspects that, in addition to financial stresses experienced, a borrower has other vulnerability factors: for example, language difficulties.

Responsible advertising

30 The Lender Responsibility Principles also require responsible advertising.

31 Lenders should follow the guidance in section 3 of the Code.

32 In particular, lenders should not take advantage of the financial stress likely to arise from the effects of COVID-19 by advertising in a way that:

- 32.1 suggests that they will not consider the borrower’s circumstances when making lending decisions;
- 32.2 that suggests that high-cost lending is a suitable form of lending for long-term or indefinite financial stress; or
- 32.3 is misleading or deceptive.

Responding to borrowers under financial stress

33 The Commission appreciates that COVID-19 and its effects will create financial stress for some borrowers and that many lenders may receive increased volumes of requests for assistance from time to time.

34 Any lender may work with any borrower at any time to provide relief from financial stress. In doing so, lenders should act in compliance with the Lender Responsibility Principles; most critically, by exercising the care and skill of a responsible lender. That means acting fairly and consistently with community expectations. The guidance above relating to the Lender Responsibility Principles may be useful in addition to the guidance provided in the Code.

35 In addition, the CCCF Act (Subpart 8: “Changes on Grounds of Unforeseen Hardship”) provides expressly that borrowers who are unable reasonably to meet their obligations under the contract can apply to the lender to change the terms of their consumer credit contract. To be eligible, the borrower must reasonably expect to meet their obligations following the changes.

- 36 A process for considering such applications is provided in the CCCF Act. The Commission considers this hardship procedure in the CCCF Act to be a minimum standard. For example, if a borrower qualifies for this process, decisions should be made at least within the timeframes set out in the Act.
- 37 Lenders can expedite variations to a loan to assist a borrower who is currently unable to make payments. In the current circumstances it may be appropriate for lenders to accept variation applications by telephone if circumstances make it difficult for applications to be made in writing.
- 38 Lenders should process applications for variations as quickly as possible and communicate their decisions to borrowers as quickly as possible.
- 39 Lenders should make sufficient inquiries to ascertain:
- 39.1 Whether the borrower is currently able to make any payments at all and, if so, how much they can afford taking into account their current income and expenses.
 - 39.2 What the borrower's other financial resources are, if any. Some borrowers may have savings, or access to family assistance or Government grants.
 - 39.3 The borrower's preferences for managing their situation. For example a borrower may wish to sell assets and apply the proceeds of sale in order to reduce the loan amount. In these circumstances, lenders should make it clear whether fees for early repayment apply and (if ascertainable) how much they are.
- 40 Lenders should offer relief that is presently necessary to assist the borrower. Any relief should be suitable to meet the borrower's immediate needs, but not unnecessarily increase the borrower's obligations or indebtedness under the contract. For example, lenders should not offer a six-month payment deferral if the borrower may be able to start making payments again in 6 weeks. They should not offer additional credit that goes beyond the relief required to meet current circumstances.
- 41 The measures taken by the Government to reduce the spread of COVID-19, including changes in Alert Level, are subject to frequent change, and the situations of both lenders and borrowers may change in ways that were not anticipated earlier. Lenders should work with borrowers to continue to discuss and adjust their position over time as the situation develops and more is known about the borrower's needs and circumstances.
- 42 For example, at the time of a request for assistance, the borrower may have lost their employment but may be likely to obtain new employment when Alert Levels change.
- 43 A lender can manage this uncertainty by taking variation decisions on a short-term basis with built in reviews. For example, by making a calendar appointment to check back in with the borrower on a certain date. The lender also can require the borrower to contact it if the borrower's situation (income or expenses) materially changes.
- 44 As discussed above in relation to affordability and suitability, while lenders may take into account a range of information to assess appropriate loan variations, care should be taken to ensure that the relief offered does not go further than is required to meet the borrower's current need or unnecessarily increase the borrower's indebtedness or financial commitments.
- 45 However, we reiterate that any lender may work with any borrower at any time to provide relief from financial stress and this is encouraged.

Disclosure

- 46 We appreciate that some lenders may have difficulties providing disclosure in accordance with the CCCF Act in the event of communications disruptions or unusually limited means of communicating with borrowers. If these circumstances apply to prevent compliance with CCCF Act requirements for disclosure in writing and/or within prescribed timeframes, the Commission will take this account in the exercise of its enforcement discretion.
- 47 Lenders should take all reasonable steps to provide disclosure in compliance with the CCCF Act. Disclosure can be provided electronically as well as by post.
- 48 At the very least, lenders should provide disclosure verbally and the lender should take all reasonable steps to ensure that the borrower understands it. Disclosure that fully complies with the requirements of the CCCF Act should be provided as soon as is reasonably practicable.
- 49 Lenders should create and keep records of the steps that they have taken to provide disclosure.

Fees

- 50 Unless specifically allowed to do so in the contract, lenders should not seek to introduce new fees or increase the amount of existing fees. All credit fees should be disclosed to the borrower before the contract is entered into. Unless the loan contract allows a lender to vary the amount of fees, lenders cannot change them unilaterally.
- 51 Fees should reflect the costs that are closely connected with the matter giving rise to the fee. Unless lenders are able to demonstrate an increase in costs at this time, fees should not be increased.